## TALHA & ANOR. v. PUBLIC PROSECUTOR

**[A. Cr. J. (Chang Min Tat J.) June 25, 1971]**

**[Ipoh — Criminal Appeal No. 26 of 1971]**

*Penal Code, s. 378 — Theft — Agreement to purchase rubber land and payment of purchase price — Taking latex from trees on land before valid transfer.*

The appellants had been respectively convicted of theft and abetment of theft of 3 katties of latex. The defence proved that the second appellant had not merely agreed to purchase the land from which the rubber was taken from the complainant and paid a deposit of $800 against the purchase price of $1,400 but also paid the balance before the date set for completion. The balance was in fact deposited with the second appellant's solicitor who had written to the complainant asking him to attend at his office to execute a valid transfer on payment of the balance.

**Held,** allowing the appeal: in respect of the land the complainant, while nominally the registered owner, was no longer the beneficial owner, but merely the bare trustee of the land for the second appellant. What the appellants took was from land the second appellant was entitled to. Therefore the conviction could not stand.

*Case referred to:-*

(1) *Public Finance Berhad* v. *Narayansamy* [1971] 2 M.L.J. 32.

MAGISTRATE'S CRIMINAL APPEAL.

*Yeow Khoon Kwong* for the appellants.

*Haidar bin Mohamed Noor* (Deputy Public Prosecutor) for the respondent.

**Chang Min Tat J.** (delivering oral judgment): The appellants were charged in the Magistrate's Court at Sitiawan respectively with the theft and abetment of theft of three katties of latex. They were found guilty and by an extraordinary show of leniency, the magistrate did not record a conviction but bound them over under section 173A of the Criminal Procedure Code. The leniency was clearly influenced by the circumstances of the defence.

The defence of the appellants was conducted by counsel who proved in cross-examination beyond any shadow of doubt that the second appellant had not merely agreed to purchase the land from which the rubber was taken from the complainant and paid a deposit of $800 against the purchase price of $1,400 but also paid the balance before the date set for completion. The balance was in fact deposited with the second appellant's solicitor and the complainant was written to to attend at the office to execute a valid transfer on payment of this balance.

Despite this evidence, the learned magistrate called on the defence and, I suppose logically, on the appellants remaining mute of malice, convicted.

Now the definition of theft is contained in section 378 of the Penal Code and in explanation (p), it is expressly stated if A in good faith, believing property belonging to Z. to be his own property, takes that property out of B.'s possession, he does not take dishonestly and he does not commit theft.

In this particular case the second appellant had not taken property out of another man's possession other than the complainant's. He had taken the latex from the trees standing on land which he bought from the complainant. In respect of this land the complainant while nominally the registered owner of that land is no longer the beneficial owner of the land but is merely the bare trustee of the land for the second appellant. What the appellants took was from land that the second appellant was entitled to. The second appellant if he chooses to initiate action in court must be entitled to specific performance of the agreement of sale. Any doubt on this point was removed by the Federal Court's decision in *Public Finance Behad* v. *Narayansamy*.[1]

The conviction cannot stand.

The Deputy Public Prosecutor very correctly does not seek to maintain it. The appeal must be allowed. The order of the magistrate is set aside and an acquittal recorded.

*Appeal allowed.*

Solicitors: *Ngan & Tan.*

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## LOO CHUAN HUAT v. PUBLIC PROSECUTOR

**[F.C. (Azmi L.P., Suffian & Ali F.JJ.) July 7, 1971]**

**[Malacca — Federal Court Criminal Appeal No. 4 of 1971]**

*Criminal Law and Procedure — Jury trial — Summing up — Misdirection — Child witness — Direction to jury on corroboration.*

*Evidence — Trial — Child witness — Corroboration — Necessity for.*

The appellant had been convicted of murder and sentenced to death. The prosecution case rested almost entirely on the evidence of a boy of 11 or 12 years old. On appeal,

**Held,** allowing the appeal: (1) although the learned trial judge in this case warned the jury of the risk of accepting the evidence of the child without corroboration, he did not invite them to consider their own experience of children and their capacity of confusing fantasy with reality. It is not sufficient merely to state the bare rule to a jury. It must be stated and illuminated in such a way that it will be a vital factor in the consideration by them of the issues before them;

(2) the warning given by the judge in this case lost much of its effect when he told them they had no reason to doubt the truthfulness of the child. Strong words were used to impress on the jury that the child's evidence was true thereby making it fruitless for them to look for corroboration;

(3) the learned trial judge held wrongly that the evidence of the elder brother of the child that the accused on that night was out looking for his mother was corroboration of the evidence of the child;

(4) in view of the serious misdirections in the summing up the conviction must be quashed.

Observations on sworn and unsworn evidence of children and the appropriate warnings to be given to juries in such cases.

*Cases referred to:-*

(1) *R.* v. *Baskerville* [1916] 2 K.B. 658.

(2) *Chao Chong & Ors.* v. *Public Prosecutor* [1960] M.L.J. 238.

(3) *Ravamanickam* v. *Public Prosecutor* [1966] 1 M.L.J. 60.

(4) *R.* v. *Campbell* [1956] 2 Q.B. 432, 438.